Supreme Court, U.S.
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NO. _____

UNITED STATES SUPREME COURT

OCTOBER 1993 TERM

NICK and GAYLE FITCH, DENNIS GORDON dba GORDON AUTOMOTIVE, WILLIAM KAMP dba WILLIAM KAMP ACCOUNTING,

Petitioners,

vs.

UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA,

Respondent,

FIRST INTERSTATE BANK OF ARIZONA; ADA WILSON;

Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI

(From Ninth Circuit Denial of Petition for Writ of Mandamus)

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97 pp

I. QUESTIONS PRESENTED FOR REVIEW.

1. Did defendants below make a good cause showing, pursuant to F.R.C.P. Rule 26, for the exclusion of plaintiffs and plaintiffs' counsel's partner and staff from any involvement in the litigation which involves information or documents which defendants deem confidential?

2. Did the District Court's exclusion of plaintiffs and plaintiffs' counsel's partner and staff from involvement in any portions of the litigation which involve information or documents which defendants deem confidential because of conduct mandated by plaintiffs' and said partner/staff's religious beliefs violate plaintiffs' First Amendment rights?

3. Did the District Court's exclusion of plaintiffs and plaintiffs' counsel's partner and staff from involvement in any portions of the litigation which involve information or documents which defendants deem confidential because of

said partner and staff's religious and family association with plaintiffs violate their First Amendment rights?

4. Should plaintiffs' counsel's partner and staff be allowed to intervene in this appeal in order that this Court's order may extend to all affected persons?[1]

[1] Additional parties who moved unsuccessfully for intervention in the Court of Appeals and who do so again herein (by separate motion filed this date) are Charls Walker (plaintiffs' counsel's partner), Michael Harper (paralegal), Zeberiah Rensch (legal assistant and runner) and Robert Brooks (secretary).

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES. vi

IV. GROUNDS FOR JURISDICTION. 1

A. The Ninth Circuit Has Sanctioned the District Court's Departure From The Accepted And Usual Course Of Judicial Proceedings (Rule 10.1a). 1

B. The District Court Decision Raises An Important Question Of Federal Law Never Ruled On By The Supreme Court (Rule 10.1c). 2

C. The District Court Decision Conflicts With Applicable Decisions Of This Court (Rule 10.1c). 3

V. APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES. 4

VI. STATEMENT OF CASE. 4

A. The Underlying Dispute. 4

B. Petitioners/Plaintiffs' Claims and Defendants' Defenses. 8

C. The Parties' Positions On The Subject Protective Order. 10

D. The Parties' Positions In The Motion Papers And At The Hearing. 12

E. The District Court's Ruling. 14

VII. BASIS FOR REQUEST FOR EXTRAORDINARY RELIEF IN THE NINTH CIRCUIT. 16

ARGUMENT

VIII. DEFENDANTS FAILED TO ESTABLISH GOOD CAUSE FOR THE EXCLUSION OF PETITIONERS AND THEIR LEGAL STAFF FROM THE LITIGATION. 20

A. FIB's "Good Cause" Showing. 21

B. The Facial Inadequacy Of FIB's "Good Cause" Showing Regarding All But One Of The Affected Parties. 22

C. Nor Has FIB Carried Its Burden With Respect To Petitioner William Kamp. 23

D. Additional Evidence That FIB's Position Is Unfounded. 28

IX. THE DISTRICT COURT'S ORDER VIOLATED THE FIRST AMENDMENT RIGHTS OF PETITIONERS AND THEIR LEGAL STAFF TO FREEDOM OF RELIGIOUS EXERCISE AND ASSOCIATION. 31

A. The Protection Extended To Free Exercise and Association Prior To Employment Division v. Smith. 32

B. The District Court's Order Cannot Satisfy The Sherbert Test. 34

C. The Effect of Employment Division v. Smith On Free Exercise Analysis. 37

D. Because This Case Is Distinguishable From Smith, The Strict Scrutiny Test Still Applies. 40

X. CONCLUSION. 44

APPENDIX:

Exhibit 1: Court of Appeals Order

Exhibit 2: District Court Order and Protective Order

Exhibit 3: Pertinent Portions of Transcript of District Court Hearing

III. TABLE OF AUTHORITIES

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, __ U.S. __, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) . . . 3, 36, 39, 40, 41, 42, 45, 46

Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) . . . 3, 32, 37, 38, 39, 40, 41, 42, 43, 45

Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) . . . 17

Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) . . . 3, 32, 33, 34, 39, 40, 41, 43

Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed.2d 430 . . . 34

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d15 (1972) . . . 35

Admiral Insurance Co. v. United States District Court, 881 F.2d 1486 (9th Cir. 1989) . . . 17, 18

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977) . . . 16

Beckman Industries, Inc. v. International Insurance Co., 966 F.2d 470 (9th Cir. 1992). . . 21

Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3rd Cir. 1986) . . . 21

Mortgages, Inc. v. United States District Court, 934 F.2d 209 (9th Cir. 1991). . . 17

National Labor Relations Board v. Hanna Boys Center, 940 F.2d1295 (9th Cir. 1991, cert. denied __ U.S. __, 112 S.Ct. 2965, 119 L.Ed.2d 586 (1992) . . . 40, 41

Gundberg v. Upjohn Co., 137 F.R.D. 372 (D.Utah 1991) . . . 20, 21

U.S. Constitution, Art. III, §2, cl 2 . . . 1
U.S. Constitution, Amendment 1 . . . 4, 19

12 U.S.C. §§4001 et.seq. . . . 8, 9
28 U.S.C. §1651 . . . 1, 16
28 U.S.C. §2106 . . . 1

12 CFR 21.11 . . . 29
12 CFR 229 . . . 8, 10
12 CFR 229.21(g) . . . 30

Supreme Court Rules 10.1 . . . 1, 2, 3
13.1 . . . 1

Federal Rules of Civil Procedure
Rule 1. . . 36
Rule 26(c). . . 2, 4, 19, 43

IV. GROUNDS FOR JURISDICTION

The Ninth Circuit of Court of Appeals denied petitioners' Petition for Writ of Mandamus on April 8, 1994. Thus, this Petition is timely under Supreme Court Rule 13.1.

This Court has authority to grant certiorari pursuant to Supreme Court Rules 10.1(a) and (c). The Court has authority to instruct the District Court to reverse its ruling under the United States Constitution Article III, §2, cl. 2 and 28 U.S.C. §§1651(a) and 2106. The bases for the request for extraordinary relief are set forth in section VII, hereinbelow.

A. The Ninth Circuit Has Sanctioned the District Court's Departure From The Accepted And Usual Course Of Judicial Proceedings (Rule 10.1a).

As will be described in greater detail below, the District Court's elimination of petitioners and petitioner's counsel's entire legal staff from the critical aspects of the litigation because of their common association with financial practices

mandated by their common religious beliefs in the absence of any showing of criminal conduct or propensity constitutes a departure "from the accepted and usual course of judicial proceedings".

B. The District Court Decision Raises An Important Question Of Federal Law Never Ruled On By The Supreme Court (Rule 10.1c).

Surely, the Federal Rules of Civil Procedure are subject to the First Amendment. And yet the effect of the lower court ruling, if allowed to stand, is to suggest that the restrictions of F.R.C.P. Rule 26 can be applied without consideration and in disregard of the parties' free exercise rights.

After exhaustive research, petitioners have been able to find no decision from this Court or any other remotely relating to or supporting such a holding.

C. The District Court Decision Conflicts With Applicable Decisions Of This Court (Rule 10.1c).

Free exercise analysis appears to be in transition since Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). However, Smith, as interpreted and explained in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, __ U.S. __, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), appears still to require application of the compelling state interest test where the rule or statute in question calls for "individualized governmental assessment". 110 S.Ct. at 1602-3.

The District Court's assessment in this instance was "individualized", and yet no effort was made to apply the compelling state interest test nor were less restrictive alternatives considered. Consequently, the District Court's ruling "conflicts" with the long line of free exercise cases, beginning with Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

V. APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."
United States Constitution, Amendment I.

"Protective Orders. Upon motion by a party or by the person from whom discovery is sought, . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or under burden or expense . . . ."
Federal Rules of Civil Procedure Rule 26(c).

VI. STATEMENT OF CASE.

A. The Underlying Dispute.

The Church of Immortal Consciousness ["Church"] is a small, non-denominational church incorporated in 1983. Its congregation of approximately 150 is now and has always been located in Mesa, Arizona and Tonto Village (a small town just northeast of Payson, Arizona). All of the plaintiffs below, as well as the affected lawyer and staff, are members of the Church.

Defendant First Interstate Bank of Arizona ["FIB"] has maintained a branch in Payson for several years. The customer service manager at the Payson FIB throughout the period relevant to this lawsuit has been defendant Ada Wilson ["Wilson"]. During the last 5-6 years, several members of the Church congregation have maintained personal or business accounts at the Payson FIB, as well as some of the Mesa FIB branches.

On August 14, 1991, plaintiff William Kamp was making deposits at the FIB Payson drive-through for four accounts held by Church members. One of the deposits was in fact a Church deposit. After receiving the deposits from Kamp, the teller began a conversation with Wilson, after which the teller told Kamp that everyone in the bank was curious about the Church and began interrogating Mr. Kamp about the beliefs of the Church. After those questions had been answered, the teller conferred with Wilson again and announced to Kamp that some of the deposits would be held.

Two days later, on August 16, Wilson and FIB Payson closed five personal and business accounts held by Church members. The funds in those accounts, some of which represented cash deposits, were held by FIB, without notice to the depositors, for several business days before their eventual release.

Petitioners allege that Wilson (and possibly others at FIB Payson) began at this point, or perhaps earlier, to communicate (to other FIB branches in Mesa and to other banks in Payson) her belief that members of the Church were kiting. Representatives of the Church group went to an FIB supervisor as early as September 1991 about the conduct of defendant Wilson and FIB Payson but were ignored.

The result was that Church member accounts began to be monitored and closed over the next 20 months at both FIB and other banks. In all, FIB has now closed eleven Church member accounts. In connection with these closures, FIB provided no warning of problems with the account, held

deposits without notice, apparently accepted deposits after the decision to close, held funds for a significant period before release and bounced checks written prior to knowledge of the surprise closures.

The last FIB accounts to be closed (in April 1993) were those of petitioners Gordon and Fitch. Those accounts were located at the Payson FIB, and the notation by Wilson at closure was that the accounts were suspected of kiting. In the case of these accounts, Wilson went a step further than she had previously gone by reporting the closures to ChexSystems, a black ball system which member financial institutions call before opening new accounts.[2] As a result of the ChexSystems report, petitioners Fitch and Gordon have been denied new accounts at every other Payson bank.

At the same time that Wilson closed the Fitch/Gordon accounts, she called the Mesa FIB branch which held petitioner William Kamp's business account and informed that branch that

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[2] As of July 1993, ChexSystems' membership included 60% of all banks in the United States, and 75% of all urban banks.

William Kamp needed to be watched, presumably because he was involved in the "kiting scheme". The Mesa branch did in fact begin daily monitoring of Kamp's account, although it was forced (by the substantial balance in the account) to honor all checks presented.

B. Plaintiffs' Claims And Defendants' Defenses.

Petitioners' Complaint states several causes of action against defendants FIB and Wilson. Among others, the Complaint alleges multiple violations of the Expedited Funds Availability Act, 12 USC §§4001 et.seq. (1989)(as interpreted by Regulation CC, 12 CFR 229), which among other things prohibits unnoticed holds, prescribes the length of time funds may be held and the type of deposits that may be held, requires certain notices of policy by the bank, specifies the reasons that a hold may be placed, imposes certain record-keeping requirements and prohibits determinations made on the basis of suspicion of the depositor (as opposed to the deposit). These claims are made on

behalf of the petitioners only (as opposed to the 1991 and 1992 victims) because the statute of limitations under the Act is one year, and the Church members had refrained from suing on the other violations in the hope that FIB would alter its practices.

The Complaint also alleges breach of contract, breach of express and implied warranties, breach of the covenant of good faith and fair dealing and defamation. The defamation cause of action points to both the ChexSystems reports and the less formal communications running from FIB Payson to other banks and other FIB branches. Again, the defamation is stated only as to the final victims because the Church members, in the hope that FIB would recant, had let the one year statute run as to the other victims.

Petitioners also request punitive damages since the torts and breaches committed against the petitioners were part of a pattern of discrimination and harassment that began at least

as early as the August 14, 1991 interrogation of William Kamp about his religious beliefs.

Defendants respond, apparently, that no Reg CC violations, breachs or defamation occurred, and that if so, FIB was justified because plaintiffs were in fact kiting or because FIB's communications were "privileged" by virtue of their need to protect themselves and/or other institutions.

C. The Parties' Positions On The Subject Protective Order.

On August 23, 1993, less than a month after FIB served its Answer, petitioners propounded discovery requests seeking, among other things, internal FIB documents relating, among other things, to the bank's policies with respect to Reg CC, loss prevention (fraud), suspected kiting or other irregular activity, uncollected funds, bank and branch operations, customer contracts, account closures, interbranch and interbank communications regarding customers, internal

investigations and audits, posting of federally-required notices, the Right of Financial Privacy Act, reports to and from government agencies about customers, and ChexSystems.

By the end of the local rule negotiations, FIB was willing to produce all responsive documents provided a protective order was in place. Petitioners, from the outset, had indicated that they had no objection to a protective order provided it was fair and even-handed. However, the parties could never come to an agreement about the terms of the protective order.

The critical difference between the parties for present purposes involved the protective order provisions defining "Qualified Persons", those who would have access to the information and documents which FIB deemed confidential. FIB's proposed order (included in Exhibit 2 hereto) provided access to FIB's house counsel, its outside counsel and their secretaries and paralegals. By contrast, that proposed order included only petitioners' lead counsel but omitted his partner,

secretaries and legal assistants. FIB's proposed order specifically excluded all plaintiffs along with "any person related to or affiliated with them."

The exclusion extended to confidential documents, depositions in which confidential information might be discussed and motions in which confidential information or documents might be involved. As a practical matter, of course, FIB's proposed order effectively excluded non-Qualified Persons from trial preparation as well.

D. The Parties' Positions In The Motion Papers And At The Hearing.

FIB's sole argument in support of its proposed protective order, both in its responsive motion papers and at the hearing, was that the Church was conducting a "massive kiting scheme" using the Churchmembers' personal and business accounts, that petitioners' accounts were part of that scheme, and that petitioners and all other

members of the Church would use FIB's internal documents to kite more effectively. Defense counsel argued in their papers and briefly at the hearing for the exclusion of plaintiffs. They did not argue exclusion of partner and staff in the papers or at the hearing. Nevertheless, the provisions of the proposed order excluding petitioners' counsel's partner and staff were consistent with FIB's general rationale since petitioners' counsel's partner and staff are all members of the Church.

As will be detailed below, petitioners denied that defendants had produced any evidence of kiting and that to deprive them of or limit their access to the documents which would prove or disprove the kiting defense, because of a determination in advance of discovery that they might be kiters, would effectively deprive them of their day in court.

Underestimating the possibility that the District Court would actually leave this uneven provision in place, petitioners did not address it

specifically in their motion papers. However, at the hearing, petitioners' counsel pointed out to the Court that the provision would extend to his entire office and leave him to do this complicated, document case alone while defendants employed a team of at least six people. (Hearing Transcript, attached hereto as Exhibit 3, pages 16/22 - 17/8.)

E. The District Court's Ruling.

The District Court instituted FIB's proposed order with only minor alterations which have no relevance here. (District Court order and FIB's adopted protective order are attached hereto as Exhibit 2.) The provisions excluding plaintiffs and plaintiffs' counsel's partner and staff were left in place.

The Court stated that "it is not unusual in litigations such as this to have, under a protective order, evidence and information that is restricted to the eyes of counsel alone." (Hearing Transcript, Exhibit 3, page 23, lines 2-5.) The Court did not explain why "eyes of counsel" meant the inclusion

of lead defense counsel's associate counsel and staff but the exclusion of petitioners' counsel's partner and staff.

In response to petitioners' counsel's protests that the Court's order would leave him virtually unable to conduct the litigation, the Court stated:

> "If you have in your employ people who are related to the parties, then that again is a matter that -- or a situation that has been created by counsel and not by the defendants, and they should not be burdened or exposed by virtue of those circumstances."

(Hearing Transcript, Exhibit 3, page 23, lines 18-22.)

The Court cut off petitioners' counsel's attempt at the hearing to rebut the kiting accusations. (Hearing Transcript, Exhibit 3, pages 11/8 - 12/7.) However, since defendants cited only the kiting danger in support of their proposed order and the Court did not offer any other rationale, the only reasonable interpretation of the ruling is that the Court accepted FIB's allegations that petitioners and the Church had probably been kiting and were

likely to use the FIB information to further their kiting scheme.

VII. BASIS FOR REQUEST FOR EXTRAORDINARY RELIEF IN THE NINTH CIRCUIT.

Petitioners originally petitioned for a writ of mandamus from the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. §1651. (See Exhibit 1 hereto.)

The Court of Appeals denied the original petition with no explanation other than the citation of Bauman v. U.S. District Court, 557 F.2d 650 (9th Cir. 1977).

Bauman establishes the Ninth Circuit's five criteria to be considered when deciding whether to grant petitions for writs of mandamus: (1) whether adequate, alternative means of appeal exists; (2) whether petitioner will be damaged in a way not correctable on post-judgment appeal; (3) whether the district court's ruling is erroneous as a matter of law; (4) whether the district court's

order manifests a persistent disregard of the federal rules; and (5) whether the petition raises new and important problems, or issues of law of first impression. Id. at 654-5.

The Ninth Circuit has acknowledged that these are guidelines not rules, that not all of them need be fulfilled, and that (4) and (5) in particular are rarely present at the same time. Admiral Insurance Co. v. United States District Court, 881 F.2d 1486, 1491 (9th Cir. 1989). See also Mortgages, Inc. v. United States District Court, 934 F.2d 209, 211 (9th Cir. 1991)(writ granted despite petitioner's inability to satisfy guidelines (2) and (4)).

Petitioners contend that their original petition to the Ninth Circuit satisfied all of the guidelines except for (4). Petitioners also contend that their satisfaction of the Ninth Circuit criteria also satisfy the prerequisites for certiorari before this Court. See Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (granting certiorari to review Court of Appeals denial of

mandamus regarding district court ruling ordering IMEs).

(1) The Ninth Circuit has held that discovery orders are not final appealable orders under 28 U.S.C. §1291 and that they are not subject to interlocutory review under the collateral order doctrine. Admiral Insurance Co., supra at 1490. Consequently, relief for petitioners from the District Court's order comes now or never.

(2) Neither petitioners' counsel nor any lawyer acting totally alone could litigate this case, given its complexity and the enormous number of documents which will ultimately be at issue. Moreover, the cost of hiring additional and unaffiliated lawyers, paralegals and secretaries would be prohibitive for these plaintiffs[3] and would, therefore, mean the end of the case or, at a minimum, substantial and irreversible damage to

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[3] Plaintiffs' counsel had put in 735 hours on this case as of February 22, the date of the hearing, despite the fact that the case was still at a relatively early stage. The paralegal who has worked on this case had put in an additional 150 hours. To replace the excluded persons, plaintiffs' counsel would have to hire (and charge plaintiffs for) an attorney at $60-100/hour, a paralegal at $25-35/hour and a secretary at $8-10/hour.

the ability of petitioners to prosecute their case. Equally important, petitioners and petitioners' counsel's partner and staff would all have been denied their rights to the free exercise of their religious beliefs. No action taken at the end of the case could remedy this loss.

(3) This will be established through the demonstration in this Petition of the illegality and unconstitutionality of the District Court's ruling under the First Amendment and F.R.C.P. Rule 26.

(5) There is, to plaintiffs' knowledge, no other decision in the Ninth or any other Circuit dealing with a situation in which one side's legal staff is left in tact while the other's is eliminated, much less one doing so despite or because of the religious practices of and religious association between the affected persons.

Frankly, although the Ninth Circuit has not said so, petitioners' suspicion is that the Court of Appeals rejected their petition in the hope that petitioners would take this issue to the Supreme

Court, where the latter might use it to shed some light on the current status of free exercise analysis.

VIII. DEFENDANTS FAILED TO ESTABLISH GOOD CAUSE FOR THE EXCLUSION OF PLAINTIFFS AND THEIR LEGAL STAFF FROM THE LITIGATION.

At the hearing and in its papers, FIB offered only one reason for instituting the protective order proposed by the bank.

> "Without a protective order prohibiting plaintiffs from having access to confidential information, nothing would stop them from turning over confidential information to Steven Kamp [the minister of the Church], who could use the information to learn how to avoid future detection of his check-kiting activity."

(Defendants' Response to Plaintiffs' Motion to Compel)

But FIB's counsel's accusation means nothing unless it is supported by a "good cause" showing. And this burden of persuasion on FIB is a "heavy" one. Gundberg v. Upjohn Co., 137 F.R.D. 372, 389 (D

Utah 1991). The burden cannot be carried by broad allegations or conclusory statements; rather, there must be specific examples or articulated reasoning. Beckman Industries, Inc. v. International Insurance Co., 966 F.2d 470, 476 (9th Cir. 1992), adopting the rule set out in Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986). FIB must show a "clearly defined and serious injury". Gundberg, supra at 390.

A. FIB's "Good Cause" Showing.

FIB's Response to the Motion to Compel is full of conclusory statements with respect to the Church's "massive kiting scheme". But the evidentiary showing consists only of the following:

1. the July 1992 monthly statement on petitioner William Kamp's "William Kamp Accounting" account showing $138,528.15 going into the account, $137,401.32 going out of the account, an opening balance of $2,676.54 and a closing balance of $2,992.54;

2. William Kamp's 1992 IRS 1040 showing a gross income of $14,359.07;

3. a letter confirming that there were 48 Churchmember accounts during a three-year period over which Reverend Steven Kamp at some time for some period of time exercised some control or offered some direction;

4. a portion of petitioner Nick Fitch's deposition in which he acknowledged that he authorized Reverend Kamp to run his account; and

5. a portion of petitioner Dennis Gordon's deposition in which he acknowledged that he authorized Reverend Kamp to run his account.

B. The Facial Inadequacy Of FIB's "Good Cause" Showing Regarding All But One Of The Affected Parties.

There is not one piece of evidence relating in any way to even one of petitioners' counsel's staff. Thus, that portion of the District Court order isolating the internal documents and information

from petitioners' counsel's partner and staff is totally unsupported by any evidentiary showing.

As to petitioners Nick Fitch (and his wife Gayle) and Dennis Gordon, the only evidence offered was that they had authorized Reverend Kamp to run their checkbooks. No matter how unusual that practice may be, there is absolutely nothing illegal or threatening to the bank about that conduct, unless there is something criminal about Reverend Kamp's handling of the checkbooks. But even though FIB makes numerous disparaging remarks about Reverend Kamp in its Response to the Motion to Compel, FIB offers not one piece of evidence suggesting in any way that Reverend Kamp had done anything wrong. Thus, there has been no good cause showing as to petitioners Fitch and Gordon.

C. Nor Has FIB Carried Its Burden With Respect To Petitioner William Kamp.

The implication made by FIB that, because there is a large disparity between a person's reported

income and the amount of money running through his account, the difference is the result of kiting is a non sequitur.[4] There is no requirement anywhere that a person deposit only reportable income in his account, or even that he deposit only his own revenues. Because FIB carries the burden of persuasion, this logical deficiency should be fatal to its position.

However, because the "kiting" accusation carries so much charge for most people, petitioners will explain the reasons for the disparity in greater detail.

One of the tenets of petitioners' Church is that an integrated experience of God comes not from separation from people but rather from vigorous and expressive interaction. Accordingly, the members of the Church are active in the world but live collectively in all aspects of their lives (other than sexual). They live more than one family to a home; they work together in their

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[4] The low beginning and ending balances on the July 1992 statement simply reflect the fact that the Church community, like most Americans, cannot afford to leave money sitting in bank accounts but must pay bills as soon as income arrives.

businesses; they buy their food and supplies in bulk. This is not a matter of convenience but, rather, spiritual mandate.

As with all people who live in the world, the Church members must maintain personal and business checking accounts. A single checkbook serving 25 businesses and 150 people would be unacceptable in the world and to the banks.[5] Therefore, individuals and businesses maintain their own accounts. Because the congregation is split between Mesa and Tonto Village, some businesses which operate in both towns are forced to maintain two accounts. Some people have left the Church community and taken their accounts with them; others have come and brought their accounts with them. In short, there have been many accounts.

However, in accordance with the Churchmembers' belief that separation is destructive of a person's relationship with God and that an income or

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[5] In the early years of the Church, an attempt was made to use few checkbooks with as many as eight names on the account. The practice was discontinued because of complaints from banks, including FIB.

expense to one person is income or expense to all, these accounts have always been viewed and treated collectively. As a result, the operation of the group resembles that of a corporation rather than that of separate individuals. Just as a corporation will move the income of one division or subsidiary to another in order to cover expenses, the Church group will often move income through its accounts to the place where expenses must be paid.

Because the daily synchronization of these accounts would be too complicated and unwieldy if all Church individuals and businesses had to consult with each other each day, Reverend Kamp (in Tonto Village) and William Kamp (in Mesa) provide that service. That is why checks are signed by the account holders but given to Reverend Kamp and William Kamp to issue.

Moreover, this system requires one or more central distributing accounts which are used to funnel income in Tonto Village to expenses in Mesa, or vice versa. In July 1992, the William

Kamp Accounting ["WKA"] account at FIB, about which defendants complain, was the central distributing account for all the Church accounts.[6] Consequently, all Church revenues would pass through that account. That is the reason for the disparity between William Kamp's bank statement and his IRS return. Petitioners have never pretended that the amount of money flowing through that account bore any relation to William Kamp's personal income.

It is this process which FIB calls "kiting". The Church has always understood that its system is alien to bankers at first glance. But neither William Kamp nor anyone else in the Church has ever knowingly written a check on insufficient funds. If they had, some bank somewhere would have lost money, and in the 10 years that the Church has been continually operating under this system, not one bank has ever lost a dime. And FIB knew in July 1992 that William Kamp was not

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[6] The WKA account was chosen for that purpose because FIB, unlike many banks, had branches in both Mesa and Payson (the town closest to Tonto Village) and because William Kamp was orchestrating the finances at the Mesa end.

kiting, as evidenced by the fact that it left the WKA account open for another 23 months.

In short, FIB has not carried its "good cause" burden with respect to any one of the plaintiffs or their legal staff.

D. Additional Evidence That FIB's Position Is Unfounded.

Although the District Court consistently placed the burden of persuasion on petitioners at the hearing, petitioners had no obligation under Rule 26 to controvert FIB's showing until FIB made one. FIB did not; so petitioners had no obligation.

Nevertheless, petitioners did place before the District Court a number of additional factors which FIB made no effort to controvert but which the Court disregarded:

1. Criminals hide. If petitioners are criminal, why have they brought this lawsuit, thereby attracting attention to themselves? And why have they made no effort in deposition or in

response to written discovery requests to withhold anything?

2. FIB is required by federal law, 12 CFR 21.11, to report any suspected kiting to the federal government within 30 days of discovery. But FIB has admitted in discovery that it never made any such report with respect to the petitioners or any other Church member. That admission cannot be reconciled with their after-the-fact claim that the Church is a "massive kiting scheme".

3. Under the law of this country, all people are innocent until proven guilty. Only in the formal and informal networking system used by the banks is that not so. That is the problem which gave rise to this lawsuit.

4. There is not much danger regarding future kiting since the parties have ceased doing business with each other.

5. Once FIB is finally required to produce its documents, counsel will need his entire staff to complete the exhaustive job of analyzing them

in preparation for depositions of FIB employees and trial. Moreover, since one of the prime issues in those depositions and at trial will be the extent to which FIB employees complied with FIB's own rules, counsel will have a frequent need to consult with the petitioners for their input as to how FIB's conduct toward them compared with FIB's written policies and procedures. In short, the participation of petitioners and staff in the discovery and trial process is critical.

6. Finally, the only confirmed illegal activity to this point in the litigation is FIB's acknowledgment in discovery that it either failed to create or destroyed the memorialization of the purported kiting activity which Reg CC required FIB to maintain. 12 CFR 229.21(g) (Comment).

IX. THE DISTRICT COURT'S ORDER VIOLATED THE FIRST AMENDMENT RIGHTS OF PETITIONERS AND THEIR LEGAL STAFF TO FREEDOM OF RELIGIOUS EXERCISE AND ASSOCIATION.

No one could imagine the Catholic Church, in the course of defending a civil action against one of its priests for allegedly molesting a young boy, having its representatives shut out of the lawsuit or being denied the services of Catholic counsel because knowledge of the police and psychological reports might enable other priests to molest undetected. Certainly, the Catholic Church would be permitted its full day in court. And yet the effect of the District Court's ruling in this instance is to deprive petitioners of that right.

The only difference, of course, is that the Catholic Church is a large and well-accepted institution with practices that have come to be viewed as conventional, whereas the Church of Immortal Consciousness practices a collectivity

which is viewed with suspicion in this age of preoccupation with "cults".

And yet arguably what makes this country different from all others is the tolerance of non-majority religion which is constitutionalized in the First Amendment. It is that protection which petitioners seek here.

A. The Protection Extended To Free Exercise And Association Prior To **Employment Division v. Smith.**

In a long line of cases beginning with Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and stretching for the next 27 years thereafter, the United States Supreme Court extended the maximum protection to free exercise and association.

In Sherbert, South Carolina had denied unemployment benefits to a Seventh Day Adventist who could not find work because of her religion's prohibition against working on Saturdays. In holding for plaintiff/petitioner, Justice Brennan

first acknowledges that religious conduct (as opposed to belief) is subject to restriction if it substantially threatens public safety, peace or order. 83 S.Ct. at 1793. But if that is not the case (as it was not in Sherbert), then the restriction is acceptable only if it does not infringe on free exercise or can be justified by a "compelling state interest". Id.

For Justice Brennan, the fact that South Carolina's welfare legislation only infringed on the religious practice indirectly (i.e., the legislation was not on its face directed at a religious group) does not matter. The effect was the same: plaintiff had to choose between adherence to her religious practice and unemployment benefits. Id. at 1794. Thus, there was infringement. Moreover, the infringement was the same regardless of whether the infringed interest was a "right" or a "privilege". Id. at 1794.

Justice Brennan then makes clear that the state interest in restriction, in order to be "compelling", must fall within the category of "the gravest

abuses, endangering paramount interests". Id. at 1795, quoting Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430. South Carolina offered up its interests in avoiding the filing of fraudulent claims based on feigned religious beliefs (an "interest" strikingly similar to that offered by FIB herein) and employers' need for Saturday work. But the Court rejects these arguments, pointing out both the unlikelihood that evidence would demonstrate this interest to be sufficiently substantial and the state's failure to demonstrate the absence of a less restrictive alternative. Id. at 1795-6.

B. The District Court's Order Cannot Satisfy The **Sherbert** Test.

All of the conduct in question here -- the collective money system and the interrelationship of plaintiffs and their legal staff -- stems directly from the affected persons' spiritual belief in the elimination of separation between individuals, between Church/family and business.

Like the Amish, the affected persons have practiced their beliefs 24 hours a day, everyday, for years, and have earned thereby the spiritual credibility which has been frequently honored by the Supreme Court. See Wisconsin v. Yoder, 406 U.S. 205, 216, 92 S.Ct. 1526, 1533-4, 32 L.Ed.2d 15 (1972)(acknowledging the importance of the fact that the Amish religious beliefs pervade their entire way of life).

The District Court's order infringes on these religious practices not only directly (i.e., punishing petitioners and their legal staff by excluding them from the litigation because of prior participation in the Church's collective system) but also indirectly (i.e., forcing them to choose between continued religious association between petitioners and Churchmember legal staff, on the one hand, and continued participation in the litigation, on the other).

There is no "compelling state interest". The only interest asserted is that of FIB, not that of society. The latter is already protected from

kiting danger by existing anti-kiting criminal legislation. Moreover, FIB has offered no evidence that the Church's financial system actually endangers the bank. Certainly, there is no evidence of an imminent "[grave] abuse, threatening paramount interests". And any societal interest in the prevention of kiting is more than countered by society's interest, expressed in F.R.C.P. Rule 1, in securing "the just, speedy, and inexpensive determination of every action", an interest which is not served by the elimination of one side's ability to prosecute its case. In this regard, the Supreme Court's most recent pronouncement on free exercise notes that:

> "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, __ U.S. __, 113 S.Ct. 2217, 2233, 124 L.Ed.2d 472 (1993).

Finally, even if the anti-kiting interest is deemed to be "compelling", the restriction is not

acceptable since less restrictive alternatives did exist. For instance, the Court could have excluded only those Churchmember parties or legal staff as to whom FIB could have demonstrated a kiting history, if any. Or the Court could have prohibited parties and staff from using any FIB accounts until permitted to do so by the Court. Or the Court could have ordered that any accounts opened by parties or staff at FIB be put on an extended hold system, thus eliminating any kiting danger. All of these alternatives would have constituted a restraint on the affected persons' free exercise, but they would have been tolerable and fair under the circumstances.

C. The Effect of Employment Division v. Smith on Free Exercise Analysis.

Petitioners are aware of the alteration in free exercise/association analysis effected by Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

Justice Scalia, writing for the majority, refuses to apply the "compelling state interest" test to an unemployment compensation statute which had the effect of infringing on religious conduct because it indirectly applied a criminal statute which, on its face, was not directed against religious practices or groups. 110 S.Ct. at 1603-4.

Significantly, the Court does not overrule the line of cases which had applied the "compelling state interest" test. Rather, it distinguishes them by saying that those cases either (1) were unemployment cases which did not involve criminal statutes and called for "individualized governmental assessment" as opposed to the application of "an across-the-board criminal prohibition on a particular form of conduct", id. at 1602-3, or (2) dealt with instances in which a separate constitutionally-recognized interest was at stake, id. at 1601-2. Thus, the Smith holding goes no further than to say that a violation of free exercise which results indirectly from the application of a neutral, generally applicable

criminal statute is not subject to strict scrutiny. Id. at 1603.

Moreover, the scope of Smith must be interpreted in the context of Lukumi, supra, which, as of this date, is the Supreme Court's most recent statement regarding free exercise. That case involved city ordinances prohibiting Santerian animal sacrifice. Since the facts fit squarely within Smith's prohibition of government action directed specifically at religious conduct, the decision is unanimous.

Nevertheless, Justice Kennedy, writing for the majority, also attempts to clarify Smith. The Court makes clear, among other things, that where the government action is not facially neutral and generally applicable, the compelling state interest test still applies. 113 S.Ct. at 2226, 2233. Closing the gap between Smith and the Sherbert progeny, the Court also holds that a finding of facial neutrality does not end the analysis, id. at 2227, and that it is necessary to look at the action's effects to determine whether, on a subtle

level, the object of the law is the targeting of religious conduct, id. at 222.

Thus, the government's ability to fashion apparently secular rationalizations for its action does not immunize the action from strict scrutiny if "the effect of [the action] in its real operation is strong evidence" of religious categorization. Id.

D. Because This Case Is Distinguishable From Smith, The Strict Scrutiny Test Still Applies.

This case is distinguishable from Smith in four respects.

First, the Supreme Court distinguishes Smith from the prior unemployment compensation, strict scrutiny cases (headed by Sherbert) by pointing out that the former involved a criminal statute whereas the latter did not. Id. at 1598-9. The instant case does not involve the application of a criminal statute.[7]

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[7] In National Labor Relations Board v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991), cert. denied __ U.S. __, 112 S.Ct. 2965, 119 L.Ed.2d 586 (1992), a post-Smith decision, the Ninth Circuit holds that it was not a violation of

Second, the fact that the plaintiffs/respondents in Smith had violated an Oregon criminal statute was uncontested. Here, the accusations of Churchmember "criminality" are vigorously contested. The determination by the District Court that the affected persons represented a kiting threat was based, presumably, on the Court's own suspicions and the accusations of defendants, but certainly not on any evidentiary showing or admission by the affected persons (as occurred in Smith). See Lukumi, 113 S.Ct. at 2225 (religious conduct entitled to protection even though not "logical" or "consistent" to the minds of others).

Third, the District Court's order was not a "neutral", "across-the-board" application. Rather, it was directed specifically at a single group of litigants who were characterized by only one

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respondent/Catholic school's free exercise rights for the NLRB to include the secular, non-teaching employees within its jurisdiction. The Court makes this finding through application of the Sherbert strict scrutiny test. Id. at 1305-6. Before employing the strict test, the Court specifically declines to apply Smith because no criminal statute was involved. Id. at 1305.

quality, namely, their common affiliation with the Church and participation in the Church's financial system, which was in turn mandated by their religious beliefs. See Lukumi, 113 S.Ct. at 2228 (the only conduct proscribed by the unconstitutional ordinances was the church members' religious conduct). Thus, the order in question here was directed specifically at a religious group and their religious practices. The order therefore falls outside the express limitations of Smith.

Fourth, the other aspect of the Supreme Court's distinction between Smith and the Sherbert cases is that the earlier cases involved "individualized governmental assessment" of the application of the unemployment criteria to plaintiff's situation. Id. at 1603. See also Lukumi, 113 S.Ct. at 2229 (overturning ordinances which require "individualized governmental assessment of the reasons for the relevant conduct"). The Federal Rules of Civil Procedure do not mandate the exclusion of persons who have engaged in certain

banking conduct. Rather, they merely give the trial court discretion to institute measures "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense".[8] F.R.C.P. Rule 26(c). The District Court's determination that petitioners' participation in their own lawsuit could be prohibited under Rule 26 constituted the sort of "individualized . . . assessment" which gives rise to strict scrutiny, even under Smith.

In summary, this case falls outside the scope of Smith and is therefore subject to review under the strict scrutiny test established in Sherbert and its 27-year progeny. Under that test, there is no sufficiently compelling state interest to validate the District Court's infringement on the affected persons' First Amendment rights, and the District

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[8] The "annoyance" or "burden" that would purportedly be placed on FIB by allowing parties and their legal staff to see the documents and information is no greater than that which has already been created by allowing plaintiffs' counsel (who is also a member of the Church) to do so.

Court failed to employ less restrictive alternatives available to it. Accordingly, the writ must be granted.

X. CONCLUSION.

Petitioners are entitled to the same day in court as those litigants whose religious beliefs and practices are "mainstream". Petitioners attribute no negative motivation to District Court Judge Rosenblatt. Perhaps, he was simply at the effect of the general bias about small, unconventional religious groups. But the fact is that the sole purpose of the subject order was to "protect" FIB against a particular group as to whom no criminality had been established and with respect to which the only common element was their religious association and practice. The effect of this order may very well be to force them to abandon a lawsuit which has not been demonstrated to be unmeritorious. This is contrary to the intent of both the F.R.C.P. and the First Amendment.

And it would be ironic if the federal courts, the primary and sometimes sole enforcers of the First Amendment, became the instrument of the deprivation of First Amendment rights.

"The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular."

Lukumi, 113 S.Ct. at 2234.

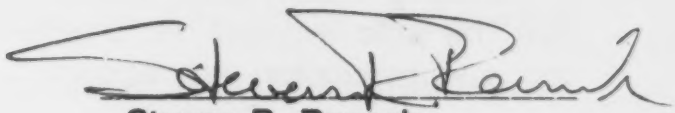
Finally, Petitioners suggest that the arrival of this appeal serves the expressed interests of this Court. Obviously, the Court was split over the Smith decision, leaving lower courts somewhat unsure as to the present status of free exercise analysis. This problem has been compounded by the changes in the Court's membership since Lukumi. Justice Souter, in his concurring opinion to Lukumi, has put out a call for acceptance of a case that will enable the Court to clear up the

confusion. Id. at 2243. The instant case serves that purpose.

Petitioners respectfully urge the Court to grant their Petition and overturn the District Court's exclusion of plaintiffs and their legal staff from the underlying litigation.

Dated: June 6, 1994.

RENSCH & WALKER



Steven R. Rensch
HCR Box 180-Z
Payson, AZ 85541
(602) 478-4678
Attorney for Plaintiffs/
Petitioners and
Intervenors

Three copies of the foregoing
mailed on June 6, 1994 to:

Honorable Paul G. Rosenblatt
United States District Court
District of Arizona
230 N. 1st Avenue
Phoenix, AZ 85025

Three copies of the foregoing
mailed on June 6, 1994 to:

Mr. Timothy J. Thomason
Streich Lang
100 W. Washington
Phoenix, AZ 85003-1897
(602) 229-5200
Attorneys for Defendants FIB
and Ada Wilson

Exhibit 1 - Ninth Circuit Court of Appeals Order

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
APR 8 1994
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NICK FITCH, et al.,	)	
	)	
Petitioners,	)	
vs.	)	No. 94-70088
	)	
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,	)	DC# CV-93-01428-PHX Arizona (Phoenix)
Respondent,	)	
	)	ORDER
FIRST INTERSTATE BANK OF ARIZONA, et al.,	)	
Real Parties-in-Interest.	)	

Before: POOLE, BEEZER and T.G. NELSON, Circuit Judges

The petition for writ of mandamus is denied. See Bauman v. United States District Court, 557

F.2d 650 (9th Cir. 1977). The motion to intervene in the petition for writ of mandamus is denied.

MoCal 4/5/94/jm
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Exhibit 2 - District Court Order

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

NICK and GAYLE FITCH, DENNIS GORDON dba GORDON AUTOMOTIVE, WILLIAM KAMP dba WILLIAM KAMP ACCOUNTING,	)	No. CIV 93-1428 PHX PGR
Plaintiffs,	)	
vs.	)	ORDER
FIRST INTERSTATE BANK OF ARIZONA, N.A.; ADA WILSON;	)	
Defendants.	)	

The Court having considered the parties' papers, all documents submitted, and counsel's argument in connection with Plaintiffs' motions to compel, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion to Compel as to Defendants First Interstate Bank of Arizona, N.A. ("First Interstate") and Ada Wilson (Doc. 31) is granted in part and denied in part as follows:

a. Plaintiffs' motion is denied to the extent that they seek entry of a protective order in the form submitted by Plaintiffs.

b. The court shall enter a protective order in the form submitted by Defendants. Defendants shall submit an original form of Order for the Court's review and signature within five days from the date of filing of this Order.

c. Plaintiffs' Motion is denied to the extent that they seek production of the entire Operations Manual of First Interstate. First Interstate shall be required to produce only those portions of the Operations Manual relevant to this lawsuit. Defendants' however, shall not engage in a restrictive interpretation of "relevant." All portions of the Operations Manual shall be subject to the Protective Order to be entered herein.

d. First Interstate shall provide Plaintiffs' counsel with the Table of Contents to its Operations Manual not later than 5:00 p.m. on Tuesday, January 22, 1994. First Interstate has further agreed to produce portions of the

Operations Manual on that date. First Interstate shall produce to Plaintiffs' counsel all relevant portions of its Operations Manual not later than 5:00 p.m. February 8, 1994.

e. The parties having reached an agreement concerning production of "non-plaintiff accounts" information, that portion of Plaintiffs' motion is deemed withdrawn, without prejudice.

f. Plaintiffs' motion is denied as to their request for information pertaining to "all Kamps." This request is overbroad.

g. Plaintiffs' request for additional production as to the SARs is granted in part and denied in part. First Interstate shall produce copies of the SARs already produced, with only the account numbers and names of account holders redacted. Said production shall be completed not later than February 8, 1994.

2. IT IS FURTHER ORDERED that, ChexSystems having failed to oppose Plaintiffs' motion, Plaintiffs' Motion to Compel against ChexSystems (Doc. 26-1) is granted as to

Plaintiffs' request pertaining to ChexSystems' customer lists dating from April, 1993, to the present.[1]

a. ChexSystems shall produce said documents within fifteen days from the date of this Order. The documents shall be protected by the protective order to be entered by the Court. In addition, ChexSystems shall provide to Plaintiffs the necessary verification(s).

b. Plaintiffs shall, within five days from the date of filing of this Order, submit a form of protective order pertaining the ChexSystems but, in all other respects, in conformance with the protective order submitted by defendant First Interstate.

3. IT IS FURTHER ORDERED that the Clerk of Court shall send a copy of this Order to Ms. Sharon Maylath, Deluxe Corporation, 1080 W. County Rd. F, P. O. Box 64399, St. Paul, Minn. 55164.

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[1]At the hearing, Plaintiffs' counsel indicated that, except for their request for the customer lists, ChexSystems had substantially complied with the Motion and Plaintiffs were therefore seeking relief only as to that issue.

DATED this 25th day of January, 1994.

/s/

Hon. Paul G. Rosenblatt
Judge, United States District Court

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DISTRICT OF ARIZONA
BY F DEPUTY

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FEB 9 1994
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
BY BW DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

NICK and GAYLE FITCH, DENNIS GORDON dba GORDON AUTOMOTIVE, WILLIAM KAMP dba WILLIAM KAMP ACCOUNTING, Plaintiffs, vs. FIRST INTERSTATE BANK OF ARIZONA; ADA WILSON; Defendants.	) No. CIV 93-1428 PHX PGR) PROTECTIVE ORDER CONCERNING CONFIDENTIAL INFORMATION

WHEREAS, the parties to this action may possess confidential information they desire to

protect under Rule 26(c)(7), Fed. R. Civ. Proc., that might be subject to discovery in this action, and

IT IS HEREBY ORDERED that:

1. "Confidential information," as used herein, means any type or classification of information which is designated as "CONFIDENTIAL" by the party to this action providing it (the "Disclosing Party"), including, but not limited to, information regarding First Interstate Bank of Arizona's policies and procedures.

2. With respect to confidential information, "Qualified Persons" means: (i) counsel of record and attorneys directly assisting them engaged in the preparation for trial of the proceeding for the parties; this term includes partners, associate attorneys, paralegals, stenographic and clerical employees assisting such counsel, provided that those people are not related to or affiliated with the plaintiffs; (ii) experts who are not themselves currently officers, directors, principal stockholders or managing agents of any

organization in competition with a party, who are assisting counsel in the preparation of this proceeding for trial; and (iii) the Court. Qualified persons does not mean the parties themselves or any person related to or affiliated with them. For example, Steven Kamp cannot be a Qualified Person.

3. Any information supplied in written or documentary form which a disclosing Party wishes to designate as confidential shall be labeled by the Disclosing Party: "CONFIDENTIAL." When information is contained or incorporated in a deposition transcript and is designated as Confidential by a Disclosing Party, the Disclosing Party shall make arrangements with the court reporter to bind the confidential portions of the transcript separately and label it "Fitch, et al. v. First Interstate Bank of Arizona, et al. - Confidential." Either party may at any time during a deposition declare that the deposition is confidential within the meaning of this Order, and all non-qualified persons present, except the

witness, shall immediately be excluded from the deposition.

4. Any information designated confidential, including deposition transcripts, shall be made available only to Qualified Persons.

5. The Disclosing Party retains ownership of all documents and information designated Confidential.

6. All documents containing Confidential information which are filed with the Court shall be filed in sealed envelopes or other appropriate sealed containers on which shall be endorsed the title of the action, an indication of the nature of the contents of the sealed envelope or other container, the word "CONFIDENTIAL" and a statement substantially in the following form:

This envelope is sealed pursuant to Order of the Court. It contains Confidential Information filed in this proceeding and is not to be opened or the contents revealed except by Order of the Court.

7. No documents designated Confidential may be copied or reproduced in any way except by

the Disclosing Party or with the express written permission of the Disclosing Party.

8. All documents containing Confidential information and all notes or other records considered Confidential and maintained in the custody of counsel of record for the parties, and partial or complete copies thereof containing information designated Confidential shall not be retained by anyone else at any location other than at such counsel's office, except that persons described in paragraph 2(ii) and 2(iii) above may retain documents on a temporary basis for purposes of study, analysis and preparation of the case. A person with custody of information designated Confidential shall maintain it in a manner that limits access only to Qualified Persons.

9. Upon final termination of this action, the parties shall assemble and return to each Disclosing Party to this action all documentary material and/or memoranda embodying information designated Confidential, including all

copies of such memoranda or documentary material, except that any documents or copies which contain or constitute attorneys' work product may be destroyed rather than returned.

10. Before a non-disclosing party gives any Qualified Person defined in ¶2(i) or (ii) information designated by the Disclosing Party as Confidential, the non-disclosing party shall: (a) supply the Disclosing Party with a copy of the Confidentiality Agreement (attached hereto as Exhibit 1) signed by the Qualified Person; (b) supply the Disclosing Party with a brief description of the Qualified Person's background and current employment; and (c) wait at least eight (8) business days after mailing the signed agreement and description to allow the Disclosing Party to move the Court for an order prohibiting disclosure. If a Disclosing Party moves the Court for such an order, the Confidential information will not be disclosed to the Qualified Person until the Court has ruled on the Disclosing Party's motion.

Certain persons are Qualified Persons for all *purposes in advance of disclosure of confidential* information. Those persons must sign the Confidentiality Agreement at the time it is entered and identify their position. They are Steven R. Rensch, plaintiffs' counsel, Mary Angela Jenkins, Defendants' counsel, Timothy J. Thomason, defendants' counsel, Dawn R. Gabel, defendants' counsel, Tina Carnahan, paralegal, Debbie Lindsay, secretary to Timothy J. Thomason, and Genie McIver, secretary to Dawn R. Gabel.

11. With respect to any information designated Confidential in conformance with this Order, a party (the "objecting party") by its counsel may, at any time, serve a written notice of objection to such designation by mail upon the party making such designation (the "designating party"). Such notice shall identify the information as to which the objecting party wishes to have the designation removed (declassified) and state the reasons for such declassification. Such objection may state the declassification is desired

generally or for a specific purpose. The designating party shall, within eight (8) business days of receipt of such notice, review the designated material sought to be declassified and notify the objecting party in writing by mail whether or not the designating party will agree to the declassification requested. If no agreement can be reached, the objecting party shall be free to move this Court for an Order of Declassification of such specified information, which motion shall set forth a description of the information and the reasons why the moving party believes it should be declassified in general or for a particular purpose (including any statement of need for declassification which the moving party deems appropriate).[1] If the Court finds it appropriate, the Court may examine the designated material in camera. The designated material in question shall continue to be treated Confidential subject to the terms of this Order until the Court acts on the

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1 The motion and all supporting memos, affidavits, exhibits and other documentation shall be considered confidential within the terms of this Order.

motion, and thereafter if the Court's ruling does not declassify the material.

12. Plaintiffs may obtain copies of checks and deposit items on Non-Plaintiff Accounts only upon payment of ten cents per page and $10.00 per hour research time.

DATED this 8th day of Feb, 1994

/s/
Honorable Paul G. Rosenblatt
Judge of the District Court

CONFIDENTIALITY AGREEMENT

This Agreement is made this ___ day of _____, by and between First Interstate Bank of Arizona, N.A., Ada Wilson, Nicholas and Gayle Fitch, Dennis Gordon dba Gordon Automotive, and William Kamp dba William Kamp Accounting (collectively referred to as the "Parties") and any "Qualified Person," who receives "confidential information," as those terms are defined below.

WHEREAS, the Parties to this action may possess confidential information they desire to protect under Rule 26(c)(7), Fed.R.Civ.Proc., that might be subject to discovery in this action, and

WHEREAS, the Court has ordered that a Protective Order be entered to prevent the imminent public dissemination or disclosure of such confidential information and that this Confidentiality Agreement be signed as part of that Protective Order.

NOW, THEREFORE, the Parties hereto, for and in consideration of the promises and covenants herein expressed, agree as follows:

1. "Confidential information," as used herein, means any type or classification of information which is designated as "CONFIDENTIAL" by the party to this action providing it (the "Disclosing Party"), including, but not limited to, information regarding First Interstate Bank of Arizona's policies and procedures.

2. With respect to confidential information, "Qualified Persons" means: (i) counsel of record and attorneys directly assisting them engaged in the preparation for trial of the proceeding for the Parties; this term includes partners, associate attorneys, paralegals, stenographic and clerical employees assisting such counsel, provided that those people are not related to or affiliated with the plaintiffs; (ii) experts who are not themselves currently officers, directors, principal stockholders or managing agents of any organization in competition with a party, who are assisting counsel in the preparation of this proceeding for trial; and (iii) the Court. Qualified

persons does not mean the Parties themselves and any person related to or affiliated with them. For example, Steven Kamp cannot be a Qualified Person.

3. Any information supplied in written or documentary form which a Disclosing Party wishes to designate as confidential shall be labeled by the Disclosing Party: "CONFIDENTIAL." When information is contained or incorporated in a deposition transcript and is designated as confidential by a Disclosing Party, the Disclosing Party shall make arrangements with the court reporter to bind the confidential portions of the transcript separately and label it "Fitch, et al. v. First Interstate Bank of Arizona, et al. - Confidential." Either party may at any time during a deposition declare that the deposition is confidential within the meaning of the Order, and all non-qualified persons present except the witness, shall immediately be excluded from the deposition.

4. Any information designated confidential, including deposition transcripts, shall be made available only to Qualified Persons.

5. The Disclosing Party retains ownership of all documents and information designated confidential.

6. All documents containing confidential information which are filed with the Court shall be filed in sealed envelopes or other appropriate sealed containers on which shall be endorsed the title of the action, an indication of the nature of the contents of the sealed envelope or other container, the word "CONFIDENTIAL" and a statement substantially in the following form:

> This envelope is sealed pursuant to Order of the Court. It contains Confidential Information filed in this proceeding and is not to be opened or the contents revealed except by Order of the Court.

7. No documents designated confidential may be copied or reproduced in any way except by the Disclosing Party or with the express written permission of the Disclosing Party.

8. All documents containing confidential information and all notes or other records considered confidential and maintained in the custody of counsel of record for the Parties, and partial or complete copies thereof containing information designated confidential shall not be retained by anyone else at any location other than at such counsel's office, except that persons described in paragraph 2(ii) and 2(iii) above may retain documents on a temporary basis for purposes of study, analysis and preparation of the case. A person with custody of information designated confidential shall maintain it in a manner that limits access only to Qualified Persons.

9. Upon final termination of this action, the Parties shall assemble and return to each Disclosing Party to this action all documentary material and/or memoranda embodying information designated confidential, including all copies of such memoranda or documentary material, except that any documents or copies

which contain or constitute attorneys' work product may be destroyed rather than returned.

10. Before a non-disclosing party gives any Qualified Person defined in ¶2(i) or (ii) information designated by the Disclosing Party as confidential, the non-disclosing party shall: (a) supply the Disclosing Party with a copy of the confidentiality agreement signed by the Qualified Person; (b) supply the Disclosing Party with a brief description of the Qualified Person's background and current employment; (c) wait at least eight (8) business days after mailing the signed agreement and description to allow the Disclosing Party to move the Court for an order prohibiting disclosure. If a Disclosing Party moves the Court for such an order, the confidential information will not be disclosed to the Qualified Person until the Court has ruled on the disclosing Party's motion.

Certain persons are Qualified Persons for all purposes in advance of disclosure of confidential information. Those persons must sign this

Agreement at the time it is entered and identify their position. They are: Steven R. Rensch, plaintiffs' counsel, Rensch, Mary Angela Jenkins, defendants' counsel, Timothy J. Thomason, defendants' counsel, Dawn R. Gabel, defendants' counsel, Tina Carnahan, defendants' paralegal, Debbie Lindsay, secretary to Timothy J. Thomason, and Genie McIver, secretary to Dawn R. Gabel.

11. With respect to any information designated confidential, a party (the "objecting party") by its counsel may, at any time, serve a written notice of objection to such designation by mail upon the party making such designation (the "designating party"). Such notice shall identify the information as to which the objecting party wishes to have the designation removed (declassified) and state the reasons for such declassification. Such objection may state that declassification is desired generally or for a specific purpose. The designating party shall, within eight (8) business days of receipt of such notice, review the designated material sought to

be declassified and notify the objecting party in writing by mail whether or not the designating party will agree to the declassification requested. If no agreement can be reached, the objecting party shall be free to move the Court for an Order of Declassification of such specified information, which motion shall set forth a description of the information and the reasons why the moving party believes it should be declassified in general or for a particular purpose (including any statement of need for declassification which the moving party deems appropriate).[1] If the Court finds it appropriate, the Court may examine the designated material in camera. The designated material in question shall continue to be treated confidential subject to the terms of this Agreement until the Court acts on the motion, and thereafter if the Court's ruling does not declassify the material.

12. This Agreement shall be construed, enforced and governed in accordance with the laws

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[1] The motion and all supporting memos, affidavits, exhibits and other documentation shall be considered confidential within the terms of this Agreement.

of the State of Arizona. The Parties waive the application of any rules of law respecting the construction of ambiguous provisions which exit in this Agreement against the party who, or whose attorney or agents, drafted such provisions. This Agreement has been negotiated at arms' length without any party acting under any coercion, or duress, and each party has been represented by legal counsel who have approved the form and content of this Agreement.

13. The Parties represent and warrant that the person signing this Agreement on their respective behalfs has the authority to do so, and that the signature which appears below binds them. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof, and any change, modification, deletion or addition to this Agreement must be in writing and signed by the Parties hereto. Except as otherwise provided herein, each provision of this Agreement shall survive the expiration of this Agreement.

14. Any notice provided hereunder shall be in writing, addressed as below, and delivered by messenger or by certified mail. If to First Interstate Bank or Ada Wilson:

Timothy J. Thomason
Dawn R. Gabel
STREICH LANG
2100 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona
85003-1897

If to Nicholas and Gayle Fitch, Dennis Gordon dba Gordon Automotive, or William Kamp dba William Kamp Accounting:

Steven R. Rensch
RENSCH & WALKER
HCR Box 180-Z
Payson, Arizona
85541

15. This Agreement may be executed in counterparts and the counterparts, upon execution and delivery, shall be deemed a complete original.

PARTIES:

FIRST INTERSTATE
BANK OF ARIZONA,
N.A.

By_____
Timothy J. Thomason
Dawn R. Gabel
STREICH LANG
A Professional
Association
2100 First Interstate
Bank Plaza
100 West Washington
Phoenix, Arizona 85003

ADA WILSON

By_____
Timothy J. Thomason
Dawn R. Gabel
STREICH LANG
A Professional
Association
2100 First Interstate
Bank Plaza
100 West Washington
Phoenix, Arizona 85003

NICHOLAS FITCH

By_____
Steven R. Rensch
RENSCH & WALKER
HCR Box 180-Z
Payson, Arizona 85541

GAYLE FITCH

By_____
Steven R. Rensch
RENSCH & WALKER
HCR Box 180-Z
Payson, Arizona 85541

DENNIS GORDON dba
GORDON AUTOMOTIVE,
and William Kamp dba
William Kamp Accounting

By_ _____
Steven R. Rensch
RENSCH & WALKER
HCR Box 180-Z
Payson, Arizona 85541

WILLIAM KAMP dba
WILLIAM KAMP
ACCOUNTING

By_____
Steven R. Rensch
RENSCH & WALKER
HCR Box 180-Z
Payson, Arizona 85541

QUALIFIED PERSONS:

_____
Steven R. Rensch

_____
Mary Angela Jenkins

_____
Timothy J. Thomason

_____
Dawn R. Gabel

_____
Tina Carnahan

Debbie Lindsey

Genie McIver

Date

Date

Date

Date

Exhibit 3 - Pertinent Portions of Transcript of District Court Hearing

COPY
FEB 7 1994
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
BY UAO DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

FITCH, et al.,	)	No. CV 93-1428-PHX-PGR
Plaintiff,	)	
vs.	)	Phoenix, Arizona
FIRST INTERSTATE BANK,	)	January 24, 1994
Defendant.	)	2:04 p.m.

TRANSCRIPT OF MOTION TO COMPEL
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	By: Steven R. Rensch RENSCH & WALKER 1655 E. University, #250 Mesa, Arizona 85203
For the Defendant:	By: Timothy J. Thomason STREICH LANG, P.A. 100 W. Washington Suite 2100 Phoenix, Arizona 85003
Court Recorder:	Vicki Reger
Transcription Service:	A/V Tronics, Inc. 100 W. Clarendon Suite 300 Phoenix, Arizona 85013

Proceedings recorded by electronic sound recording, transcript produced by transcription service. (end of page 1)

(beginning of page 11)

And if they tell us there are other accounts with Kamp in it that they want us to look for, we'll do that, too.

THE COURT: Thank you, Counsel. Reply.

MR. RENSCH: Unfortunately, I had to submit an extended reply, because this could quickly

become a McCarthy trial. Yelling kiters, somehow with the charge that word carries, win the day with it.

I would like to throw out again, remind everybody involved what the question is here. To me, the question is not whether or not my clients are kiters, but whether or not they're going to be denied access to the documents so we can determine whether that's true or not.

One misrepresentation was the suggestion that these documents that we seek only go to he check kiting issue. As I suggested in my long list of points of relevance in the original motion, there are lots of things these documents go to beyond that, beginning with the regulation CC violations at First Interstate Bank. And yes, some it goes to the check kiting defense.

But see, basically to me, the question is, "Are plaintiffs going to get their day in court on this issue?" To deny access to these internal documents, whether they relate to possible kiting security or not, to deny plaintiffs access to these

documents now is to deny them the chance to litigate the issue itself.

THE COURT: Well, Counsel, you now, you don't talk to a jury -- a Court the way you might talk to a jury. I know what the discovery rules are. I deal with them every day of the week, every week of the year.

MR. RENSCH: Okay.

THE COURT: So let's stick with the relevant objections and the response to your motion to compel.

And to satisfy a point of curiosity with the Court, you had cited a district court case, Kamp Implement Co. v. JI case. Is that any --

MR. RENSCH: No connection whatsoever.

THE COURT: Okay.

MR. RENSCH: It was a bank case, but other than that, there's no connection at all.

THE COURT: Okay. I was just curious.

MR. RENSCH: All right. Thank you for that admonition, Your Honor. I will keep it more confined here.

What I would point to again is the --

THE COURT: What about -- why should Steven Kamp have access to these? He's not a party to the lawsuit.

MR. RENSCH: Well, to me, the only case law that either side could find suggests that his position is directly analogous to that of THK suggestion of THK and the Brittain cases. In the Brittain case, they showed the documents to a plaintiff who was a direct competitor of the defendant. In (end of page 12)

(beginning of page 16)
the bankers, and you can take a look at their records.

MR. RENSCH: Yes, but the earmark of this case to this point, Your Honor, and the reason this has become so essential, is that the large amount of documentation, that First Interstate was required by federal law to keep that would have memorialized what actually happened with these accounts, they have, for whatever reasons,

destroyed them. All the discovery requests that I directed to them asked for all those memorializations that the federal regulations require. They say they don't exist.

So I'm at the point where the direct evidence of what they claim was so about these accounts has been destroyed by them. I'm not attributing any motivation. I don't know what the reason was. I know that the law requires them to keep it and they didn't keep it. So now these operational documents become particularly important to me, because I have to go by the back door to find out what really happened with these accounts.

But, Your honor, let me go on with the list of the problems with the defendants' proposed protective order, because there are some other subtle ones that are important.

The list of qualified persons that they suggest include, not only Mr. Thomason but also his co-counsel working with him and house counsel for First Interstate. I am restricted to myself. My

partner is not included on that list, nor is my paralegal nor are my assistants.

And there's a provision they put in the protective order that says that none of my staff who are related to the plaintiffs can have any access to the documents. See, what they know, because I've told them from the beginning, is mine is totally a family business. Every person who works in my office is related to the plaintiffs by law or by blood. They knew that.

Their protective order also includes two sets of eight-day waiting periods with a further delay by discovery. In general -- and they also require me at the end to return all the documents to them, which I paid a small fortune to obtain, which I will be doing now, paying them for the documents that they produce to me and the documents they've already produced. I'm supposed to turn them back without reimbursement.

All of these things, taken together, to me create a very one-sided, unfair protective order. In my proposed protective order, which like theirs

is attached to my motion, I attempted to even these things out.

The truth is, if this is the major stumbling block before the Court, namely the Steven Kamp issue, I'm willing to let go of that one. But these other points need to be addressed, because basically what's happening is in a subtle way they have cut off my ability to do deposition and trial

(end of page 17)

(beginning of page 23)

the Court's ruling, which is to grant the motion to compel in part and to deny it in part, is that it is not unusual in litigations such as this to have, under protective order, evidence and information that is restricted to the eyes of counsel alone. It is not unusual at all. And often there are very good reasons. I believe in this particular case, the defendants have shown good reason why the protective order should limit access to this information to the eyes of counsel.

The fact that you are a sole practitioner, Counsel, doesn't affect the law that applies to discovery concerning these matters. And it simply means that you are the one who will be responsible for presenting the information to this Court and to any jury as the person who must know what that evidence may be. But beyond that, confidentiality of such important and proprietary general information such as this must be protected by this Court.

If you have in your employ people who are related to the parties, then that again is a matter that -- or a situation that has been created by counsel and not by the defendants, and they should not be burdened or exposed by virtue of those circumstances.

So the protective order will be restricting the confidential information to counsel and to qualified experts as otherwise set forth in the defendant's proposed motion for

(end of page 23)